

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

307

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA)
)
 Appellee)
)
 v.)
)
 WENDELL MCINTOSH)
)
 Appellant)

No. 22, 538

APPELLANT'S BRIEF

United States Court of Appeals
for the District of Columbia Circuit

FILED AUG 8 1969

Nathan J. Paulson
CLERK

Worth Rowley
1730 Rhode Island Avenue, N. W.
Washington, D. C. 20036
Attorney for Wendell McIntosh,
Appointed by this Court

Table of Contents

Table of Cases - - - - -	1, 2
Issue Presented for Review - - - - -	3
Reference to Ruling - - - - -	3
Statement of the Case - - - - -	3
Argument - - - - -	5
Conclusion - - - - -	9

Table of Cases

<u>Bailey v. United States</u> , No. 21,428, decided March 7, 1969 - - - - -	5
<u>Barber v. United States</u> , _____ U.S. App. D.C. _____, 392 F. 2d 517 (1968) - - - - -	8
<u>Blakney v. United States</u> , 130 U.S. App. D.C. 87, 397 F. 2d 648 (1968) - - - - -	5
<u>Brooke v. United States</u> , 128 U.S. App. D.C. 19, 385 F. 2d 279 (1967) - - - - -	8
<u>Castle v. United States</u> , 120 U.S. App. D.C. 398, 347 F. 2d 492 (1965), cert. denied, 381 U.S. 929, 953, reh. denied 382 U.S. 874 - - - - -	8
<u>Covington v. United States</u> , 125 U.S. App. D.C. 224, 370 F. 2d 246 (1966) - - - - -	5
<u>Davis v. United States</u> , No. 21,723 and companion cases, all decided February 18, 1969 - - - - -	5
<u>Evans v. United States</u> , 130 U.S. App. D.C. 114, 397 F. 2d 675 (1968) - - - - -	8

Table of Cases (Continued)

<u>Gass v. United States</u> , No. 21,198, decided January 29, 1969 - - - - -	5
<u>Gordon v. United States</u> , 127 U.S. App. D.C. 343, 383 F. 2d 936 (1967), cert. denied, 390 U.S. 1029 (1968) - - -	3, 5, 7, 8, 9
<u>Luck v. United States</u> , 121 U.S. App. D.C. 151, 348 F. 2d 763 (1965) - - - - -	3, 4, 5, 6, 8
<u>Marshburn v. United States</u> , No. 22,057, decided March 27, 1969 - - - - -	5
<u>United States v. Carr</u> , No. 22,373, decided July 22, 1969 - - -	5
* <u>United States v. Coleman</u> , _____ U.S. App. D.C. _____, _____ F. 2d _____ (____), No. 22,316, decided July 11, 1969 - - -	5, 6, 7
<u>Weaver v. United States</u> , _____ U.S. App. D.C. _____, 408 F. 2d 1269, fn. 4 (1969) - - - - -	5, 8, 9
<u>Wright v. United States</u> , No. 21,759; decided March 27, 1969 - - - - -	5

Issue Presented for Review

Whether the court below misapplied the doctrine of Luck v. United States, 121 U.S. App. D.C. 151, 348 F. 2d 763 (1965), as elucidated by Gordon v. United States, 127 U.S. App. D.C. 343, 383 F. 2d 936 (1967), cert. denied, 390 U.S. 1029 (1968), in permitting the government to adduce a 1961 Harrison Narcotics Act conviction to impeach the credibility of the defendant herein, when the defendant was the only available witness in his own behalf.

This case has not heretofore been before this court.

Reference to Ruling

The ruling of the court below on the Luck issue is found in the September 12, 1968 transcript of proceedings at pages 115-117. It was made after an extended evidentiary hearing on defendant's motions to suppress evidence (Tr. 3-111) and proceeded on the basis of a discussion with counsel for the defendant and for the government (Tr. 111-115).

Statement of the Case

This defendant stands convicted of mail theft and is serving a sentence of from one to five years. Evidence at his trial showed that Post Office personnel saw him leaving a mail area near the passenger gates at Union Station carrying a mailed parcel. When asked about the parcel then and there, the defendant said that it was his. When it became apparent from examination of the parcel that it was not, the defendant explained that he must have made a mistake, that he must have the wrong parcel, that he

had had one of the same size and shape, but that this one was not his. The case turned on the defendant's explanation of the circumstances under which the mailed parcel came into his possession.

The trial was preceded by an extensive hearing on defendant's motion to suppress evidence, at which the government's chief witnesses and the defendant himself testified in detail about those circumstances. Then, before the trial began, the defendant's counsel advised the court that the defendant himself was the only witness he had -- the only one who could tell the defendant's story -- and asked the court for a Luck ruling with respect to the adducibility for impeachment purposes of defendant's 1955 larceny after trust conviction and his three 1961 narcotics convictions. The court ruled (Tr. 115-117) that government counsel would be permitted to introduce or question the defendant about one of these convictions, giving government counsel his choice. Government counsel opted to use a 1961 "Harrison narcotics conviction" not otherwise described or specified in the present record (Tr. 116), and did so while cross-examining the defendant when he testified in his own behalf (Tr. 201). Moreover, in final argument government counsel again called the jury's attention to this conviction (Supplementary transcript of summation, September 13, 1968, pages 12-13). Thereafter the court instructed the jury that it might consider the conviction in evaluating the credence to be given the defendant's testimony (Tr. 233).

Argument

The Court is respectfully requested to read the following pages of the trial transcript: Tr. 111-117, McIntosh's application for a Luck ruling, and proceedings and decision thereon; Tr. 13-17, 44-109, testimony of government witnesses and of defendant at the pre-trial hearing preceding the Luck ruling; Tr. 125-215, trial testimony of government witnesses and of defendant; Tr. 233, Court's charge to jury relating to the defendant's prior criminal record; pages 10 and 11 of the supplementary transcript of September 13, 1968, captioned "Excerpt of Proceedings - Summation" and containing the government's summation on defendant's prior criminal record.

This appeal is controlled by United States v. Coleman, ____ U.S. App. D.C. ____, ____ F. 2d ____ (No. 22,316, decided July 11, 1969), where this court applied "Luck and its progeny"^{1/} to a trial conducted in the light of the guidelines laid down by Gordon v. United States, 127 U.S. App. D.C. 343, 383 F. 2d 936 (1967), cert. denied 390 U.S. 1029 (1968). In Coleman, as in the present case, the crux of the government's proof was the defendant's possession of property not lawfully his and the inculpatory

^{1/} The Luck family tree to January 22, 1969 is set out in an appendix to the Court's opinion in Weaver v. United States, ____ U.S. App. D.C. ____, 408 F. 2d 1269 (1969), listing 24 cases cited by this Court since Luck in which the issue of impeachment by prior conviction was raised on appeal and discussed in an opinion. The appendix omits Covington v. United States, 125 U.S. App. D.C. 224, 370 F. 2d 246 (1966), and Blakney v. United States, 130 U.S. App. D.C. 87, 397 F. 2d 648 (1968). Supervening cases include Gass v. United States, No. 21,198, decided January 29, 1969; Davis v. United States, No. 21,723 and companion cases, all decided February 18, 1969; Bailey v. United States, No. 21,428 decided March 7, 1969; Marshburn v. United States, No. 22,057, decided March 27, 1969; Wright v. United States, No. 21,759, decided March 27, 1969; United States v. Coleman, No. 22,316, decided July 11, 1969; United States v. Carr, No. 22,373, decided July 22, 1969.

implications of that possession if it be not satisfactorily explained. Recognizing the critical importance of the explanation, this court held that the District Court in Coleman had failed to exercise proper discretion when it ruled, without striking the balance between prejudicial evidence and relevant evidence which Luck requires, that defendant's prior conviction of "anything that has to do with cheating and stealing is admissible" to discredit and impeach the defendant's testimony in his own behalf.

Graver error is present in the instant case. First, the narcotics conviction is not significantly relevant on the credibility issue: it does not involve dishonesty or false statement. Second, the narcotics conviction is far more prejudicial in character than "anything that has to do with cheating and stealing." Third, here, unlike in Coleman, the Luck ruling was preceded by comprehensive evidence on defendant's motions to suppress. This evidence not only demonstrated the defendant's case depended solely upon his own testimony explaining his possession of the mailed package; it also advantaged the government by giving it comprehensive discovery of the defendant's case prior to trial, thereby enabling the government more sharply to analyze the defendant's testimony, to prepare a careful cross-examination of him for the trial, and to investigate his story and in the light of it to prepare anticipating or rebuttal evidence. Under these circumstances the government's need for discrediting the defendant on the basis of a criminal record was correspondingly reduced.

Both in the Coleman case and in the present case, evidence that would reflect directly upon the defendant's veracity was important to the quest for truth, while evidence that would tend to generate prejudice and inflame the jury against the defendant, without bearing upon his veracity, would interfere with the quest for truth.

A Harrison Narcotics Act conviction tends far more strongly than "anything that has to do with cheating or stealing" to generate antipathy and prejudice, and accordingly, under the Gordon guidelines, it should not be used for impeachment unless it bears upon testimonial credibility. The Gordon "rule of thumb" holds that convictions evidencing dishonest conduct relate to testimonial credibility, while those involving assaultive or violent conduct do not. Because a Harrison Narcotics Act conviction does not evidence dishonest conduct and can be based upon the most technical and tenuous of grounds -- mere unexplained possession of narcotic drugs -- it is just not germane to the credibility issue. The performance of an act which was perfectly legal prior to 1914 does not show such a character defect as to bear significantly on veracity. Accordingly there is no occasion for the exercise of judicial discretion to determine that the prejudicial effect of the convictions is outweighed by its relevance to the search for truth. It cannot be.

Here government counsel was apparently of the view that the Harrison Narcotics Act conviction showed the defendant to be a narcotics addict, argu-

ing that "narcotic addicts are notorious liars" (Tr. 113). Of course, it shows nothing of the kind; on the contrary, addiction may be a defense to such a charge. See Castle v. United States, 120 U.S. App. D.C. 398, 347 F. 2d 492 (1965), cert. denied, 381 U.S. 929, 953, reh. denied 382 U.S. 874. In the context of this present case, a Harrison Narcotics Act conviction is one of the "inflammatory irrelevancies" that leads astray the jury's quest for truth, Barber v. United States, ____ U.S. App. D.C. ____, 392 F. 2d 517 (1968).

On two occasions since Gordon this court has had before it Luck rulings which have permitted narcotics law convictions to be used for impeachment purposes.^{2/} In both cases, the Luck doctrine was held to be inapplicable because the defendant was not the essential source of the evidence which he sought to adduce: he had put his story before the jury through other evidence, and his testimony could be only cumulative. In neither case did the court deal with the question whether in a Luck situation the government can impeach a defendant on the basis of a prejudicial, unexplained and non-germane Harrison Narcotics Act conviction.

Impeachment by a prior conviction involves nice constitutional questions on which this court has not yet ruled. See Weaver v. United States, ____ U.S. App. D.C. ____, 408 F. 2d 1269, fn. 4 (1969). To avoid further

^{2/} Brooke v. United States, 128 U.S. App. D.C. 19, 385 F. 2d 279 (1967); Evans v. United States, 130 U.S. App. D.C. 114, 397 F. 2d 675 (1968).

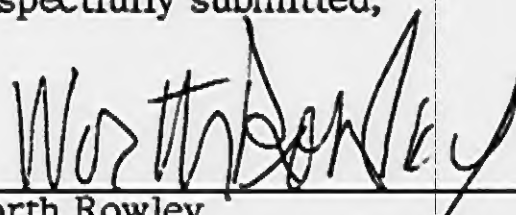


beclouding the constitutional status of such impeachment, this court should insist that where the defendant's testimony is essential to his case and no character evidence has been affirmatively introduced by the defense, only a conviction shown to bear directly upon veracity and character and involving dishonesty or false statement can be used to impeach his credibility, conformably with the Gordon guidelines. Otherwise, the constitutional issue is presented by the instant case, and should be decided in favor of the defendant on the basis of the argument and brief submitted to the court in Weaver.

Conclusion

In the light of the foregoing, defendant's conviction should be set aside and the case remanded to the District Court for a new trial at which the defendant can testify without being subject to the prejudicial taint of an irrelevant Harrison Narcotics Act conviction.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'Worth Rowley', is written over a horizontal line.

Worth Rowley
1730 Rhode Island Avenue, N. W.
Washington, D. C. 20036
Attorney for the Defendant
(Appointed by this Court)

Dated: August 8, 1969